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No. 81-2337

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.,
PETITIONERS

v.

THE STATE OF NORTH DAKOTA, EX REL.
BOARD OF UNIVERSITY AND SCHOOL LANDS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether a State's action to quiet title to land against the United States is subject to the 12-year statute of limitations in the Quiet Title Act, 28 U.S.C. 2409a(f).*

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* Petitioners, in addition to the Secretary of Agriculture, named in the caption, are James G. Watt, Secretary of the Interior; Robert F. Burford, Director of the United States Bureau of Land Management; and R. Max Peterson, Chief of the United States Forest Service. Petitioners are all successors in office to the defendants named in the complaint and amended complaint. See Rule 40.3 of the Rules of this Court.

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 671 F.2d 271. The opinion of the district court entered on February 4, 1981 (Pet. App. 17a-28a) is reported at 506 F. Supp. 619. The memorandum and order of the district court entered on February 21, 1980 (Pet. App. 14a-16a), is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1982 (Pet. App. 31a-32a), and a timely petition for rehearing was denied on March 15, 1982 (Pet. App. 33a). On June 4, 1982, Justice

Blackmun extended the time for filing a petition for a writ of certiorari to and including July 13, 1982. The petition for a writ of certiorari was filed on June 22, 1982, and was granted on October 4, 1982. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

28 U.S.C. 2409a provides:

> (a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under sections 1346, 1347, 1491, or 2410 of this title, sections 7424, 7425, or 7426 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 7424, 7425, and 7426), or section 208 of the Act of July 10, 1952 (43 U.S.C. 666).
>
> (b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possession or control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control.
>
> (c) The complaint shall set forth with particularity the nature of the right, title, or interest

which the plaintiff claims in the real property, the circumstances under which it was acquired, and the right, title, or interest claimed by the United States.

(d) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title.

(e) A civil action against the United States under this section shall be tried by the court without a jury.

(f) Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

(g) Nothing in this section shall be construed to permit suits against the United States based upon adverse possession.

28 U.S.C. 1346(f) provides:

The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

STATEMENT

The United States holds lands and reserved mineral interests bordering the Little Missouri River in North Dakota and claims title to the bed of that river

primarily as a riparian landowner (Pet. App. 3a n.2, 23a).[1] Some of these lands are administered by the Department of Agriculture, through the Forest Service, the remainder by agencies of the Department of the Interior (Tr. 29, 47-49, 66-67, 68, 72-73, 76-77). Since at least 1955, the Bureau of Land Management has issued oil and gas leases covering portions of the riverbed (Pet. App. 2a; Tr. 24, 34, 35, 57, 97-99, 104-106). North Dakota claims title to the same riverbed as navigable water bottoms under the Equal Footing Doctrine.

1. On October 31, 1978, respondent (hereinafter "the State") commenced this action by filing a complaint against predecessors of the petitioning federal officials, seeking to have them enjoined from issuing mineral leases on the riverbed or otherwise exercising privileges of ownership there (J.A. 6-9). The complaint alleged that the Little Missouri River has been navigable since the time of the State's admission to the Union in 1889, and that the State therefore became the owner of the riverbed under the Equal Footing Doctrine (J.A. 7-8). The complaint asserted that the United States, through its Bureau of Land Management, has issued leases for the development of minerals on and underlying the bed of the river, and that activities of the Department of Agriculture and the Department of the Interior "constitute an unlawful encroachment and a slander of title upon the sovereign lands of the State of North Dakota" (J.A. 8). Accordingly, the State sought relief restraining the federal defendants from developing "or otherwise exercising privileges of ownership upon the

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[1] In some instances, the United States claimed the bed alone where the State had excluded the riverbed portions of school grant lands and made indemnity selections. See Tr. 38-48.

bed of the Little Missouri River within the State of North Dakota", and declaring the River to be navigable "for the purpose of determining ownership of the bed" (J.A. 9).

The complaint alleged jurisdiction under 28 U.S.C. 1331 (federal question), 28 U.S.C. 1361 (mandamus), 28 U.S.C. 2201-2202 (declaratory judgment and further relief), and 5 U.S.C. 701-706 (the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*) (J.A. 6). In its answer (J.A. 10-12), and later in a cross-motion for summary judgment, the Government argued that the action was in the nature of a quiet title suit against the United States, and that such an action is authorized only under the Quiet Title Act.[2] Because the action was brought more than 12 years from the date that the State knew or should have known of the claim of the United States, the Government argued that the district court lacked jurisdiction.

In an order entered on February 21, 1980 (Pet. App. 14a-16a), the district court denied the federal defendants' motion for summary judgment.[3] The district court found that "[t]he action lies squarely under 28 U.S.C. § 2409a" (*id.* at 15a). Accordingly, the court ordered the complaint dismissed unless it was amended "to recite an adequate jurisdictional basis" (*id.* at 16a). The court did not address the question of when the State knew or should have known of the claim of the United States (*id.* at 15a).

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[2] The Act of Oct. 25, 1972, Pub. L. No. 92-562, 86 Stat. 1176, codified at 28 U.S.C. 2409a, 28 U.S.C. 1346(f) and 28 U.S.C. 1402(d).

[3] That order also denied a motion for summary judgment which the State had filed.

The State subsequently filed an amended complaint on March 12, 1980 (J.A. 13-16), which was substantially identical to the State's original complaint, except that it based jurisdiction on the Quiet Title Act, as well as on the previously-alleged statutes (J.A. 13). The amended complaint did not name the United States as a defendant, nor did it set out the particular land claimed by the United States which was at issue, as required by the Quiet Title Act, 28 U.S.C. 2409a(c).[4]

Subsequently, the United States filed an answer to the amended complaint (J.A. 17-19). It was the Government's position in these proceedings (1) that the Little Missouri River had not been navigable at the time of the State's entry into the Union and that therefore the riverbed was not sovereign land of the State, and (2) that the State's action challenging the federal exercise of ownership over the riverbed was, in any event, barred by the 12-year limitations provision of the Quiet Title Act, 28 U.S.C. 2409a(f). A one-day trial was held on December 16, 1980.

2. At that trial, the government presented one witness, an employee of the Bureau of Land Management, who testified as to the Government's activity on the Little Missouri River since 1955, for the purpose of showing that the State knew or should have known of the federal claim more than 12 years before the action was begun and that the suit was therefore

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[4] During the proceedings, however, it was made clear that the State was claiming the whole of the bed of the Little Missouri River in North Dakota except the portion embraced within the Fort Berthold Indian Reservation, which was left out of the adjudication. See Pet. App. 19a-20a, 29a-30a. See, also *id.* at 3a n.3. Under the approach followed by the courts below, it was presumably unimportant to identify with particularity the areas of riverbed claimed by the United States.

barred by 28 U.S.C. 2409a(f).[5] The State did not present any witnesses. On the question whether the

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[5] The Government's witness testified that the federal leasing program had been in existence since 1955 (Tr. 24-27, Defendants' Exhibit I), and that five leases issued in 1962 were competitive leases publicly advertised in the State (Tr. 104-107). See 43 C.F.R. 192.51 (1963).

The federal defendants also relied on a letter dated March 18, 1955, from the Bureau of Land Management to the State Attorney General's office, requesting the State's view "whether or not the Little Missouri River was navigable or non-navigable at the time of admission of the State of North Dakota to the Union." The State Attorney General's office had responded by letter dated March 25, 1955 that according to the State Land Commissioner and the Water Conservation Commission, the Little Missouri River "is not now and has not been considered navigable." Those letters were attached to the Defendants' Supplemental Brief of December 5, 1979. See Tr. 123.

Finally, among the documentary evidence submitted by the Government was a letter from attorney Russell R. Mather, addressed to the Bank of North Dakota and the Land Department of the State Board of University and School Lands, dated January 27, 1966, more than 12 years prior to the commencement of the suit (Defendants' Exhibit L 60; Tr. 37). That letter stated:

> In connection with the acquisition by Superior Oil Company of certain leases pertaining to the river bed of the Little Missouri, we have been advised that the United States Government is claiming an interest in the river bed on the basis that it was not a navigable river at the time of the entry of the State of North Dakota into the Union. We submit that in accordance with the position of the State of North Dakota, the Little Missouri was, in fact, navigable and that the State of North Dakota is the owner of the river bed.
>
> It is possible that representatives of the State of North Dakota would wish to confer with the Department of the Interior to see if this question can be resolved by litigation so that the rights of the respective parties may be established.

Little Missouri River was navigable at the time the State entered the Union, the State relied on documentary evidence it had previously presented.

On February 3, 1981, the district court entered a Memorandum and Order (Pet. App. 17a-28a). With regard to the navigability of the river, the district court briefly discussed the historic data submitted by the State and concluded that the river was navigable at the time the State was admitted to the Union.[6] Accordingly, the court found that the riverbed vested in the State under the Equal Footing Doctrine enunciated in *Shively* v. *Bowlby*, 152 U.S. 1, 26-31 (1894).

The district court further held that the action was not barred by the statute of limitations, because the limitations provision of the Quiet Title Act applied only to natural persons or corporations, and not to a "sovereign" with respect to "trust lands held in its sovereign capacity" (Pet. App. 25a-27a). Because the district court found the limitations provision inapplicable, it did not rule on the federal defendants' allegation that the State had had notice of the federal claim to the riverbed more than 12 years before this lawsuit was brought.

In its final judgment, the court declared, inter alia, (Pet. App. 29a-30a) that "[t]itle to the bed of the Little Missouri River within the State of North Dakota, excluding [a specified area], is hereby quieted

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[6] The district court relied essentially on (1) an account of a trip down the Little Missouri in 1804 by a French Canadian, Baptiste Le Page, who concluded that the river was essentially non-navigable, even though he managed the trip in his canoe; (2) a report of a logging operation in 1881-1882 that managed to float some logs down the river (though the operation was a failure); and (3) some present-day canoe traffic (Pet. App. 20a-21a). The court also concluded that the river has continued to be navigable to this date (*id.* at 21a).

in the State of North Dakota," and it directed (*id.* at 30a) "the United States * * * to cease and desist from further developing or otherwise exercising privileges of ownership" upon that riverbed within the State.[7]

3. On cross-appeals, the court of appeals affirmed the district court's judgment in all respects (Pet. App. 1a-13a). It concluded (*id.* at 4a-9a) that the limitations provision in the Quiet Title Act, 28 U.S.C. 2409a (f), cannot be asserted by the United States against States, at least where "public trust lands" are concerned. On the merits, it affirmed the district court's finding with respect to the navigability of the Little Missouri at the time of the State's admission to the Union (Pet. App. 10a-13a), although it noted that "the evidence in the record concerning navigability is rather thin" (*id.* at 13a). Because it found district court jurisdiction under the Quiet Title Act, the court of appeals declined to rule on the State's contentions that the federal question provision, 28 U.S.C. 1331, was an adequate jurisdictional basis for the action and that if any statutory waiver of sovereign immunity was required, such a waiver was to be found in the 1976 amendment to the Administrative Procedure Act, 5 U.S.C. 702 (Pet. App. 9a).[8]

In its ruling on the statute of limitations question, the court of appeals started from the premise that, "[u]nder the rule of *quod nullum tempus occurrit regi* the defense of statute of limitations and laches cannot be asserted against a sovereign" (Pet. App. 4a), and that in American law, exemplified by *Weber* v.

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[7] The portion of the riverbed excluded from the judgment was land within the Fort Berthold Indian Reservation occupied by the Three Affiliated Tribes. See note 4, *supra*.

[8] This issue is raised in the State's conditional Cross-Petition for a writ of certiorari in No. 82-132.

Board of Harbor Commissioners, 85 U.S. (18 Wall.) 57, 70 (1873), the rule is qualified only by an exception for cases in which "the statute expressly designates the sovereign or when the sovereign must necessarily be subject to the statute as determined by legislative intent" (Pet. App. 5a). The court also emphasized the character of the lands in question as "[p]ublic trust lands," which it defined as "lands * * * held in trust for the citizens of a state [as] distinguished from lands which the State holds in a proprietary capacity" (*ibid.*).

The court noted (Pet. App. 6a) that States are not specifically mentioned in 28 U.S.C. 2409a(f), which applies to "[a]ny civil action" brought under 28 U.S.C. 2409a, and that they were not expressly referred to in the legislative history of the Quiet Title Act. In the court's view, this congressional silence evidenced an intent to exclude the States from the application of this provision of the Act (Pet. App. 6a). The court also concluded (*id.* at 7a), on the basis of the enactment in 1953 of the Submerged Lands Act, 43 U.S.C. 1301 *et seq.* (which confirmed in the States title to lands beneath waters navigable at the time of statehood), that Congress would find the policies of limitations provisions—notably the desirability of limiting the litigation of stale claims—inapplicable to claims asserted by States.

The court briefly considered the federal defendants' contention that the limitations provision in 28 U.S.C. 2409a(f) is a condition of the waiver of sovereign immunity by the United States and that such waivers must be strictly construed; but it observed (Pet. App. 7a) that this was merely a principle to be weighed against the State's immunity from limitations provisions that do not expressly mention the States. In

balancing the two, the court concluded (*id.* at 7a-8a) that because "the interest of the people of the State of North Dakota is quieting title to public trust lands is great" and because Congress could, in any event, amend the Quiet Title Act to make the limitations provision expressly applicable to the States, the State's interest should prevail.

SUMMARY OF ARGUMENT

I

A.

The present suit is esentially an action to try title to land the United States claims to own and presently possesses. Absent a statutory waiver, sovereign immunity bars any suit to wrest title from the federal Government. That rule applies to States no less than private citizens. And, at least in circumstances like those presented here, the barrier of sovereign immunity cannot be circumvented by suing the federal custodian, rather than the United States by name. Nor does the State's assertion that its title derives from the constitutional Equal Footing Doctrine justify any exception to the principle that no action will lie to require a transfer of land from the national domain unless Congress has consented.

In the present context, the applicable waiver statute is the Quiet Title Act, 28 U.S.C. 2409a. By its terms, Section 702 of the Administrative Procedure Act does not reach this case. Although States are not expressly mentioned as potential plaintiffs under the Quiet Title Act, there is no reason to exclude them. Indeed, this Court has twice recently construed the Act as embracing State land claims asserted against the United States.

B.

Since North Dakota must invoke the Quiet Title Act, it is, like any other plaintiff, bound by the conditions attached to the consent to suit. One of these is that the action be filed not later than 12 years after the plaintiff knew or should have known of the federal claim. Although, vis-a-vis their own citizens, sovereigns are usually exempt from time limitations, that rule is inapplicable when a State is suing the Nation. Most courts, including this Court, have held a State plaintiff subject to limitations provisions with respect to its claims against the United States. There is no basis for any special exemption here. Having necessarily invoked the Quiet Title Act, North Dakota must live by all its terms, including the requirement of filing its claim within 12 years of notice or constructive notice of the federal interest.

II

The result is no different even if—contrary to our primary argument—sovereign immunity is not a bar to North Dakota's suit. At the least, the Quiet Title Act of 1972 established a uniform procedure for prosecuting claims to land to which the United States asserts title. Here, every consideration suggests that Congress meant to provide a single procedural scheme for such actions, not merely a supplemental remedy. Accordingly, whatever alternatives, if any, existed before, the Quiet Title Act has now fully occupied the field, and the rules there prescribed, including time limits, must be followed.

Given the adequacy of the new remedy, there can be no question of Congressional power to "regularize"

procedure as it has done. The "constitutional" basis of the State's claim does not exempt it from such procedural rules. Nor is there any basis for believing that the Quiet Title Act is in any respect unsatisfactory to vindicate constitutional rights. It is wholly reasonable to treat as stale claims to land where the federal interest has been manifest for more than 12 years.

ARGUMENT

I. THE LIMITATIONS PROVISION OF THE QUIET TITLE ACT IS APPLICABLE TO THIS ACTION BECAUSE TIMELY FILING IS A CONDITION OF CONSENT TO A SUIT OTHERWISE BARRED BY SOVEREIGN IMMUNITY

Our primary submission is simply that the 12-year limitations period announced by 28 U.S.C. 2409a(f) governs this case because that provision stipulates a condition to the maintenance of any action under the federal Quiet Title Act, 28 U.S.C. 2409a, a statute consenting to suit against the United States that must be followed in all its terms. This assumes, of course, that the present action is one under the Quiet Title Act, a point disputed by North Dakota in both courts below and now tendered by its Cross-Petition, No. 82-132.[9] Accordingly, we initially ask whether, because

[9] No action having been taken on the Cross-Petition, we might treat this threshold question as not presently before the Court. Yet, we believe it would be pointless to obtain a ruling that a State, like any other plaintiff, is bound by the limitations provision of Section 2409a(f) when it invokes the Quiet Title Act, if a State is free to circumvent that holding by eschewing the consent statute and obtaining the same relief under 28 U.S.C. 1331 and 5 U.S.C. 702—as North Dakota here sought to do. Indeed, it may well be that, independently of its Cross-Petition, the State is entitled to defend the judgment in its favor on the alternative ground that its

sovereign immunity would otherwise bar the suit and no other waiver statute applies, North Dakota was required to invoke the Quiet Title Act here.[10] After answering that question in the affirmative, we turn to the issue whether a State, claiming "constitutional" title, is specially exempted from the limitation provision of the statute.

A. This action can be maintained only under the Quiet Title Act

1. All relief sought by North Dakota is premised solely on its contention that the State, rather than the United States, owns the bed of the Little Missouri River in the relevant stretch. It has never been suggested that the activities of the federal officials complained of—primarily leasing the water bottoms for oil and gas development—are not authorized by statute or contravene the Constitution if the United States is the true owner. And, similarly, the United States has invoked only its claimed ownership of the riverbed as justification for its actions. In short, the dispute is over title to the submerged lands—nothing else.

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suit was not required to invoke the Quiet Title Act at all. See, e.g., *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 419 (1977). At all events, if necessary, the Court is free to consider this issue by granting the Cross-Petition to this extent when it decides the case on the merits. Cf. *Confederated Tribes* v. *Washington*, No. 78-60, decided with *Washington* v. *Confederated Tribes*, 447 U.S. 134, 164 n.32 (1980); 447 U.S. 916 (1980). Notwithstanding our earlier Memorandum in Opposition, we urge the Court to follow that course if the issue is not otherwise here.

[10] We note our alternative argument (pages 29-36, *infra*) to the effect that the Quiet Title Act controls the present action even if sovereign immunity would not have prevented a like suit before 1972.

To be sure, the predicate of North Dakota's claim is that the River was "navigable" at the time of its admission to the Union, and the State invokes the Equal Footing Doctrine, its Organic Act and the Submerged Lands Act as confirming its title to the riverbed. And we deny that the portion of the Little Missouri involved was or is navigable.[11] But that does not make this a case about navigability, rather than ownership. It is common ground that if the River was navigable at statehood, the bed belongs to North Dakota and, if it was not, to the United States as riparian owner. Navigability is relevant only because it directly determines title. As North Dakota candidly stated in the prayer of its Complaint (¶ 2, J.A. 9, 16), a declaration that the River was navigable was sought "for the purpose of determining ownership to the bed." The upshot is that we are confronted with an action to quiet title to land.

This accordingly appears to be the classic case of a State asserting a claim against the United States that founders on the bar of sovereign immunity, absent an express waiver by Congress. See *Kansas* v. *United States*, 204 U.S. 331, 342 (1907); *Monaco* v. *Mississippi*, 292 U.S. 313, 321 (1934).[12] Normally, of

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[11] North Dakota persists in asserting that we have conceded the navigable character of the Little Missouri River in the relevant stretch. We have not. The position of the United States in every court has been that the issue of navigability could not be reached because the suit was barred by limitations. Even assuming that if we do not prevail on that threshhold defense, we will be foreclosed from contesting navigability (a proposition we dispute), it does not follow that we must be taken to have admitted that the River was navigable.

[12] Of course, no waiver of sovereign immunity is required when the United States itself invokes the courts to vindicate its claim of title, whether by initiating the lawsuit or volun-

course, the obstacle cannot be circumvented by suing an officer of the Government. E.g., *Oregon* v. *Hitchcock*, 202 U.S. 60 (1906); *State of Louisiana* v. *Garfield*, 211 U.S. 70 (1908); *State of New Mexico* v. *Lane*, 243 U.S. 52 (1917); *Hawaii* v. *Gordon*, 373 U.S. 57 (1963).[13] It is argued here, however, that the State's claim is somehow exempted from the usual rule because it rests on the self-executing force of the Constitution and involves "sovereign trust lands." See *Oregon ex rel State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

2. The short answer is that this was precisely the same character of claim advanced as against the

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tarily intervening in an action begun by others. E.g., *United States* v. *Texas*, 143 U.S. 621 (1892); *State of Oklahoma* v. *State of Texas*, 252 U.S. 372 (1920); *State of Oklahoma* v. *State of Texas*, 256 U.S. 70, 84 (1921); *United States* v. *Utah*, 283 U.S. 64 (1931); *United States* v. *California*, 332 U.S. 19 (1947); *United States* v. *Louisiana*, 339 U.S. 699 (1950); *United States* v. *Texas*, 339 U.S. 707 (1950); *United States* v. *Louisiana*, 363 U.S. 1 (1960); *United States* v. *Maine*, 420 U.S. 515 (1975); *United States* v. *Alaska*, 422 U.S. 184 (1975). See, also, *United States* v. *Mississippi*, 380 U.S. 128, 140 (1965). Indeed, the long list of cases involving disputed land claims between the United States and one or more States in which the United States has been the original plaintiff or intervening plaintiff illustrates the rule that, absent special legislation, the affected State or States could not cast the United States in the role of defendant until the enactment of 28 U.S.C. 2409a in 1972. In the instances cited, the national Government deemed it appropriate to submit its claim of title to adjudication. But the essence of sovereign immunity is that the United States need not do so unless it chooses.

[13] It goes without saying that the State cannot avoid the bar of sovereign immunity because, over objection, a lower court has improperly overruled the plea and decided the merits in its favor. Cf. *Dugan* v. *Rank*, 372 U.S. 609 (1963).

United States in *California* v. *Arizona*, 440 U.S. 59, 63 (1979), which the Court held "could not be maintained in any court" but for the Quiet Title Act. There, as here, the States claimed adversely to the United States lands alleged to constitute the bed of a navigable river, which had automatically inured to California and Arizona at statehood under the Equal Footing Doctrine. Yet, the Court permitted the suit to proceed only by virtue of a construction of the Quiet Title Act that conferred jurisdiction on this Court as well as the district courts. 440 U.S. at 63-68. Obviously, that ruling was superfluous if the sovereign immunity of the United States did not erect a barrier that Congress must waive.

In *California* v. *Arizona*, it is true, the United States was made a defendant eo nomine, whereas here Government officers are sued. But it can hardly be supposed that the States in the former case could have achieved their objective of quieting title by the simple device of substituting the Secretary of the Interior or the Director of the Bureau of Land Management as custodian of the lands claimed. If that solution had been available, presumably the parties or the Court would have suggested it as an alternative to burdening this Court's Original Docket with a difficult jurisdictional question implicating fundamental constitutional doctrine. See 440 U.S. at 65-66. The United States was named defendant because the Nation was the appropriate, indeed the "indispensable," party. *Id.* at 61-62.

3. We need not, however, rest solely on *California* v. *Arizona*. It is little more than a play on words to contend that because the State asserts a "constitutional" title, therefore the officers of the national Government treating that land as a part of the public

domain are acting "unconstitutionally" within the exception recognized by *Malone* v. *Bowdoin*, 369 U.S. 643, 647-648 (1962) and *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690, 697, 701-702 (1949). Cf. *Ex parte Young*, 209 U.S. 123 (1908). So far as the doctrine of sovereign immunity is concerned, there is no justification for distinguishing between a State claim to land premised on the Equal Footing Doctrine and one based on the State's organic act (as in *Hawaii* v. *Gordon*, *supra*, and *State of New Mexico* v. *Lane*, *supra*) or on a later grant from Congress (as in *Oregon* v. *Hitchcock*, *supra*).[14] These are equally "sovereign" lands, held "in trust" for the people of the State. See *Lassen* v. *Arizona Highway Department*, 385 U.S. 458, 460-461 (1967). Nor are we aware of any constitutional obstacle to the exercise of national sovereign prerogative of eminent domain with respect to State-owned lands, in whatever status held or by whatever title derived. See *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941). See, also, *United States* v. *Carmack*, 329 U.S. 230, 236-242 (1946). On the contrary, North Dakota expressly concedes (82-132 Cross-Pet. 15 n.24) that "the Submerged Lands Act * * * specifically allows the United States to condemn the beds of navigable waters. 43 U.S.C. 1311(d)." See, also, 43 U.S.C. 1313(a).

At all events, a claim of "unconstitutionality" is insufficient to overcome the bar of sovereign immunity

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[14] We note that, here, North Dakota invokes, in addition to the Equal Footing Doctrine, the Enabling Act of Feb. 22, 1889 for the State of North Dakota (ch. 180, 25 Stat. 678), and the Submerged Lands Act (43 U.S.C. 1301 *et seq.*). See 82-132 Cross-Pet. 8. It would be odd if the State's *statutory* claim to the riverbed were foreclosed, but not its *constitutional* claim.

when, as here, a successful judgment would expend itself on the public treasury or the public domain by the compelled delivery to the plaintiff of substantial funds or lands presently held for the citizenry as a whole. That is so in the case of a suit against the State or its officials. *Quern* v. *Jordan*, 440 U.S. 332 (1979); *Alabama* v. *Pugh*, 438 U.S. 781 (1978); *Edelman* v. *Jordan*, 415 U.S. 651 (1974); *Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945). See, also, *Florida Department of State* v. *Treasure Salvors Inc.*, No. 80-1348 (July 1, 1982), slip op. 18-19 (plurality opinion). A fortiori, the United States enjoys the same immunity. See *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 691 n.11, citing *North Carolina* v. *Temple*, 134 U.S. 22 (1890); *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371, 374-375 (1945), and cases there cited. No doubt, as *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.*, *supra*, indicates, the injured State may prosecute an action for just compensation in the Court of Claims if its property has been "taken" by the Nation. But the availability of that remedy, if timely pursued, fully satisfies the Constitution. See *Larson* v. *Domestic & Foreign Commerce Corp. supra*, 337 U.S. at 697 n.18, 703 n.27.

This is the essence of sovereign immunity. No citizen may, without consent, sue to compel a State to disgorge public funds—except only as just compensation for property taken (see *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933))—or to relinquish the lands it holds for the public. And vis-a-vis the United States, neither a citizen nor a State may do so. Here must end the fiction that the allegedly "wrongful" act of the officer is his own and not that of his sovereign, if only because the relief sought requires an

exercise of sovereignty. See Frankfurter, J., dissenting, in *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 711-712. If it were otherwise, nothing would be left of the principle that the sovereign is immune from suit. Increasingly, the supposed "harshness" of the rule has led to legislative waivers, special and general. But such consent statutes merely reflect the persistence of the doctrine. Notably, the Quiet Title Act involved here assumes pre-existing immunity from a suit to wrest title from the national domain. See page 33, *infra*.

4. The present case clearly falls within this "core" area where the principle of sovereign immunity still holds sway, absent a Congressional waiver. North Dakota's Complaint (both as originally filed and as later amended), claiming ownership of the bed of the Little Missouri River for the State (¶ 13, J.A. 8, 15), expressly alleged that the United States, through the Bureau of Land Management and the Forest Service, was "unlawfully asserting ownership" of the riverbed (¶¶ 6 and 7, J.A. 7, 14), by issuing mineral leases and "otherwise unlawfully exerci[zing] other privileges of ownership" (¶ 14, J.A. 8, 14). And while the prayer was not in terms for a judgment "quieting title" in the State, North Dakota sought a declaration that the River was navigable "for the purpose of determining ownership of the bed" (Prayer ¶ 2, J.A. 9, 16)—which comes to the same thing. Indeed, after the district court had proceeded to try the case and found the River navigable (Pet. App. 17a-28a), the State tendered, and the court entered, a judgment expressly quieting "title" to the bed "in the State of North Dakota" and enjoining "the United States" from interfering with that title. (Pet. App. 29a-30a).

In sum, this was no suit to restrain an errant official engaged in an unauthorized frolic of his own. There is not, nor could be, any challenge to the actions of Bureau of Land Management and Forest Service officers as lacking authority in statutes and regulations if the riverbed belonged to the United States. And, of course, there is no claim that the underlying legislation, the Mineral Leasing Act of 1920 (30 U.S.C. 181 *et seq.*) or the Mineral Leasing Act for Acquired Lands of 1947 (30 U.S.C. 351 *et seq.*), is unconstitutional in any respect. The allegation of "unlawful" conduct is confined to the complaint that the United States is erroneously "asserting ownership" of land the State claims for itself. As we said at the start, this is a classic dispute over land ownership and the proceeding is, at bottom, a suit to try title.

It cannot matter that the State sought and obtained only prospective injunctive relief, foregoing any accounting claim for the past. Only last Term, this Court emphasized that *Edelman* v. *Jordan*, *supra*, should not be read as limiting a State's sovereign immunity to suits seeking "a judgment payable from the state treasury." *Cory* v. *White*, No. 80-1556 (June 14, 1982), slip op. 5-6. The same principle surely applies when the Nation's sovereign immunity from suit is implicated. The result here is that a portion of the federal public domain is transferred to State ownership. That is no less a violation of sovereignty than compelling a disbursement from the Treasury. In sum, we agree with the district court that the present action was one that could proceed only upon the basis of an express consent statute —in this instance, the Quiet Title Act, 28 U.S.C. 2409a. See Pet. App. 14a-16a. See also *id.* at 18a-19a.

5. Unquestionably, the Quiet Title Act is the applicable statute by which the United States has waived its sovereign immunity in the present context. There is, in this instance, no unique legislative waiver, specially authorizing the particular suit. Compare *Utah* v. *United States*, 394 U.S. 89, 90 (1969); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 387-388 (1902). And, on the other hand, the case does not satisfy the more general provision of the 1976 amendment to the Administrative Procedure Act, 5 U.S.C. 702, permitting judicial review of "agency action," even where the United States is the named or real party defendant.

Other objections aside,[15] Section 702 is in terms inapplicable when "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." This requires us to turn to the Quiet Title Act, 28 U.S.C. 2409a, enacted four years earlier and obviously relevant in the premises. The latter statute waives sovereign immunity only on

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[15] Whatever the full breadth of 5 U.S.C. 702 (compare *Estate of Watson* v. *Blumenthal*, 586 F.2d 925 (2d Cir. 1978), with *Jaffee* v. *United States*, 592 F.2d 712 (3d Cir. 1979)), it does not easily embrace an action to quiet title to land, or to determine the navigable character of a river. In such a case, there may be no "agency action" (or inaction) to "review," and nothing to "set aside" or "compel." See 5 U.S.C. 551(13), 702, 704, 706. The fact that, in the present instance, the United States had issued leases covering the disputed riverbed is largely fortuitous. Even so, it should be noted that North Dakota's complaint apparently did not seek to annul outstanding leases, but only to enjoin future leases on the basis of a declaration that the river was navigable and therefore in State ownership. We do not pursue the point because we believe it clear that Section 702 is, in terms, inapplicable where another consent statute already occupies the field. Pages 22-23, *infra*.

stipulated conditions, among them that the action be timely filed after actual or constructive notice of the federal claim. 28 U.S.C. 2409a(f). See pages 24-29, *infra*. Thus, it seems clear Section 702 cannot be invoked to assert stale lands claims, since the Quiet Title Act "expressly * * * forbids [such] relief."

At all events, it is hardly conceivable that, without even the most casual remark, the Congress of 1976 meant to remove an important safeguard for the public domain by permitting adverse claimants effectively to try title to long acknowledged federal lands through a suit to "review" the most recent actions of federal officials asserting the ownership of the United States. Of course, Section 702 allows challenges to the administration of federal lands on the ground that the actions complained of violate procedural or substantive restrictions imposed by applicable law. But the amendment to the APA was never conceived of as affording a vehicle for questioning the underlying federal title. Indeed, the Congress of 1976 adverted to the Quiet Title Act as a sound precedent, already providing a satisfactory scheme for challenging federal land claims, and gave no indication that it should be superceded or duplicated with an alternative procedure. The legislative focus was on other categories of cases, not then embraced by any waiver statute. See S. Rep. No. 94-996, 94th Cong., 2d Sess. 7-8, 11-12, 26-27 (1976); H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 8-9, 13-14 (1976). In short, the Quiet Title Act remains the exclusive procedure for judicially resolving land title disputes against the United States. See *Cummings* v. *United States*, 648 F.2d 289 (5th Cir. 1981); *McClellan* v. *Kimball*, 623 F.2d 83 (9th Cir. 1980). See also, Point II, *infra*.

The Quiet Title Act, it is true, makes no express mention of a State as plaintiff. But that is no ground for excluding State claims from its coverage—any more than States should be denied the benefits of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or the Tucker Act (28 U.S.C. 1346, 1491), which equally fail to mention State plaintiffs in terms. This Court has now twice construed the Quiet Title Act as embracing a State allegation of ownership to land claimed by the United States. See *California* v. *Arizona*, *supra*, 440 U.S. at 63-65; *California ex rel. State Lands Commission* v. *United States*, No. 89, Original (June 18, 1982), slip op. 3 n.6. There is no reason to reconsider the question today.

B. The limitations provision of the Quiet Title Act governs an action brought by a State under the Act

Having determined that the Quiet Title Act governs this suit, we look to its terms. While granting consent to sue the United States over title to land, the statute conditions that waiver of sovereign immunity upon the filing of the action "within twelve years of the date * * * the plaintiff or his predecessor in interest knew or should have known of the claim of the United States." 28 U.S.C. 2409a(f). Because there was substantial evidence that North Dakota knew of the federal assertion of title to the disputed riverbed more than 12 years before the present action was filed (see Statement, note 5, *supra*),[16] the critical

[16] Although the United States limited its evidence at trial to the limitations issue, the district court did not determine whether North Dakota "knew or should have known of the claim of the United States" in 1955, or 1962, or early 1966, or at any other date more than 12 years before the suit was filed in October, 1978. Nor did the court of appeals, since

question is whether this limitations provision controls a suit by a State claiming "public trust" lands under the constitutional Equal Footing Doctrine.

1. We submit an affirmative answer is unavoidable. It is, of course, settled that the United States may attach conditions to the waiver of its sovereign immunity from suit, and that such conditions must be strictly respected. That is true when the terms of the consent disallow the presence of third parties (e.g., *United States* v. *Sherwood*, 312 U.S. 584 (1941)), restrict the forum in which the action may be brought (e.g., *Minnesota* v. *United States*, 305 U.S. 382 (1939)), or limit the category of cases that may be appealed (e.g., *Reid* v. *United States*, 211 U.S. 529 (1909). And, most relevantly, limitations provisions requiring the filing of the suit within a stated period are equally enforceable conditions to the waiver of sovereign immunity. *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979). Accord, *Kendall* v. *United States*, 107 U.S. 123 (1882); *Finn* v. *United States*, 123 U.S. 227 (1887); *Munro* v. *United States*, 303 U.S. 36 (1938); *Soriano* v. *United States*, 352 U.S. 270 (1957). See, also, *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122, 130-131 (1868).

It is not apparent why the same rule should not apply when a State is the plaintiff. The *Minnesota* case, just cited, indicates that it does. And that is in

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it shared the district court's view that the limitations provision was inapplicable. It is apparent, however, that both courts below treated the evidence of North Dakota's "knowledge" as sufficiently substantial to justify consideration of the question whether 28 U.S.C. 2409a(f) governs a suit by a State. Of course, if our submission is accepted, the case must be remanded for a factual finding as to when North Dakota knew or should have known of the federal claim.

no way a surprising result. After all, vis-a-vis the superior sovereignty of the United States, a State, like any other claimant, sues only by virtue of congressional consent and, in principle, ought to be bound by the terms of that consent. Since limitations provisions are not distinguishable from other conditions attaching to waivers of sovereign immunity, there would seem to be no basis for specifically exempting a State plaintiff from their force. Indeed, this Court has not hesitated to enforce such a bar against a State claim. *United States* v. *Louisiana*, 127 U.S. 182, 185, 192 (1888). And, with the exception of the decision below and one interlocutory district court ruling (*State of California ex rel. State Lands Commission* v. *United States*, 512 F. Supp. 36 (N.D. Cal. 1981)), every other court to consider this question has applied limitations provisions to a suit by a State against the United States. E.g., *United States* v. *422,978 Square Feet of Land*, 445 F.2d 1180, 1187-1188 (9th Cir. 1971); *State of Nevada* v. *United States*, 628 F.2d 1357 (9th Cir. 1980) (table), cert. denied, 450 U.S. 995 (1981); *People of California* v. *United States*, 132 F. Supp. 208 (Ct. Cl. 1955). See, also, *Park County, Montana* v. *United States*, 626 F.2d 718, 720 (9th Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

2. The principle that time does not run against the sovereign is out of place here. That rule normally controls as between a State and its citizens. E.g., *Weber* v. *Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 70 (1873). It derives from considerations of public policy akin to those which inform the defensive doctrine of sovereign immunity. See *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132-133 (1938). But, just as the State's immunity from suit must give way when the United States is the claimant—although

the converse is not true (*Kansas* v. *United States*, *supra*, 204 U.S. at 342)—so, also, the State's exemption from limitations is ineffective when the Nation has consented to be sued only on timely claims, even though the United States suffers no like disability (*United States* v. *California*, 332 U.S. 19, 39-40 (1947); 28 U.S.C. 2415(c)).

The rule may appear one-sided. This is, however, no more than a recognition that, within its sphere, our Constitution gives the national Government ultimate supremacy. A dispute between a State and the United States "is not a controversy between equals" (*Sanitary District* v. *United States*, 266 U.S. 405, 425 (1925)) and the subordinate sovereign must yield to the paramount power, representing the broader interest of all the people of the United States. *Id.* at 426.

We have already dealt with the contention that a different rule applies here because of the "constitutional" origin of the State's title and the "public trust" status of the lands claimed. Given that a suit so based nevertheless requires Congressional waiver of sovereign immunity, it is difficult to appreciate why the terms of that consent should not control.[17]

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[17] The limitations provision of 28 U.S.C. 2409(f) was not overlooked in the two recent cases in which a State invoked the original jurisdiction of this Court to assert a constitutionally-based land claim against the United States. In *California* v. *Arizona*, *supra*, as the Court noted (440 U.S. at 63 n.4), the United States asserted limitations against California and Arizona as to a portion of the former riverbed claimed by those States. The issue did not reach the Court because the Special Master ruled that the United States had not asserted an unambiguous claim to the land in controversy more than 12 years before the suit and we did not except from that determination. See Report of the Special Master in No. 78,

Here, as elsewhere, the plaintiff invoking a special statutory permission must abide by the conditions attached. As against the United States, the States are not uniquely free to discard the burdens while claiming the privilege.

3. In sum, we believe the court of appeals was entirely correct in suggesting that, even as to a State, "there can be [no] constitutional objection to the federal government's placement of a [time] limit on the extent to which it will give up its immunity." Pet. App. 8a n.8. Where we cannot follow the courts below is in their conclusion that, without explicitly mentioning them as potential plaintiffs, Congress meant to permit States to invoke the Quiet Title Act, yet, without the slightest hint in the text or the legislative history, intended specially to exempt States from the limitations provision of the same statute. See Pet. App. 4a-9a, 18a-19a, 25a-27a. In our view, that is playing fast and loose with legislative silence.[18]

Original 2 (filed June 15, 1981) and the Decree ultimately entered by consent of all parties. 452 U.S. 431 (1981).

In *California ex rel. State Lands Commission* v. *United States, supra,* no limitations defense was interposed because the first unambiguous assertion of ownership by the United States was too recent. See slip op. 2 & n.4.

[18] We cannot accept the suggestion by the court of appeals (Pet. App. 7a) that enactment of the Submerged Lands Act in *1953* is somehow relevant to Congress' intent when considering the Quiet Title Act in *1972*. At best, the Submerged Lands Act, by "relinquish[ing]" to the States the Nation's interest in "lands beneath navigable waters" (43 U.S.C. 1311(a)(1)), including the beds of navigable rivers (43 U.S.C. 1301(a)(1)), revived some stale claims. Even that is qualified in the case of alienated unsurveyed stream beds (43 U.S.C. 1301(f)), lands "retained" by the United States at statehood or later acquired by "eminent domain proceedings

One can logically argue—albeit only by repudiating this Court's statements in *California* v. *Arizona*, *supra*, 440 U.S. at 63-65, and *California ex rel. State Lands Commission* v. *United States*, *supra*, slip op. 3 n.6—that the failure of Congress to mention State claims suggests the total inapplicability of the Quiet Title Act to States. Cf. *Quern* v. *Jordan*, *supra*, 440 U.S. at 343. But no impartial reader can construe the Act as embracing States within the word "plaintiff" in all sections of the statute except only section (f), the limitations provision. Moreover, such a construction is literally impossible under a text that expressly stipulates: "*Any* civil action under this [Act] shall be barred unless it is commenced within twelve years of the date upon which it accrued." 28 U.S.C. 2409a(f) (emphasis added).

II. THE LIMITATIONS PROVISION OF THE QUIET TITLE ACT IS APPLICABLE TO THIS ACTION EVEN IF SUCH A SUIT COULD HAVE BEEN MAINTAINED BEFORE 1972 WITHOUT ANY WAIVER OF SOVEREIGN IMMUNITY

Our principal submission is that North Dakota is bound by the limitations provision of the Quiet Title Act because, without that statutory consent, sovereign immunity would bar the State's suit altogether. Like all others who must invoke Congressional permission to sue the Nation over title to land, North Dakota, we

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* * * or otherwise in a proprietary capacity" (43 U.S.C. 1313(a)), and any lands "presently and actually occupied by the United States under claim of right" (*ibid.*). But, at all events, there is no basis for reading the Submerged Lands Act as a perpetual assurance that the lands encompassed by the grant would remain in the States regardless of any adverse claim by the United States and a prolonged failure to contest the federal assertion of ownership.

say, must take the sour with the sweet. But we believe the same result follows even if the State could have maintained the present suit before the enactment of the Quiet Title Act.

1. Although the Constitution itself is the basis of a right of action against official action, it has always been accepted that Congress may determine the means through which the right may be implemented—including the form of the action, the forum in which it shall be commenced, the procedure for trial, the governing rules of evidence, and the methods available for executing any judgment rendered. The Judicial Code, the Federal Rules of Civil Procedure, and the Federal Rules of Evidence apply to constitutional claims like all others brought in the federal courts. After all, it is only by virtue of jurisdictional statutes —such as Sections 1331, 1343, 1362, 1441, 1491 and 1505 of Title 28—that suits founded on the Constitution are maintainable in federal courts. See, e.g., *Davis* v. *Passman*, 442 U.S. 228, 231, 236, 243 (1979). And, of course, that is true when no waiver of sovereign immunity is required, and the procedural rules accordingly cannot be viewed as conditions attached to a consent to suit. We submit the same principle applies to time limits imposed by the Judicial Code.

Thus, the Court has held that the Just Compensation Clause of the Fifth Amendment entitles the owner whose property has been taken by the Government to damages, including interest from the date of taking, independently of any statute so providing. *Jacobs* v. *Unted States*, *supra*, 290 U.S. at 16. See, also, *United States* v. *Clarke*, 445 U.S. 253, 257 (1980). Yet, it has never been doubted that Congress could confine such a suit against the United States to

the Court of Claims when the recovery sought exceeded $10,000, as it did in the Tucker Act, 28 U.S.C. 1346(a), 1491. And, more to the point, courts—including this Court—have uniformly sustained the six-year limitations of the Tucker Act against a "constitutional taking" claim. E.g., *Soriano* v. *United States*, *supra*, 352 U.S. at 273-275; *Steel Improvement & Forge Co.* v. *United States*, 355 F.2d 627, 631 (Ct. Cl. 1966); *Loesch* v. *United States*, 645 F.2d 905, 924 (Ct. Cl. 1981). See, also, *United States* v. *Dickinson*, 331 U.S. 745 (1947). Indeed, the time bar has been successfully invoked against belated Just Compensation actions brought by a State. *United States* v. *422,978 Square Feet of Land*, *supra*; *People of California* v. *United States*, *supra*.

2. We believe a like rule governs under the Quiet Title Act. Assuming, arguendo, a State could have, before 1972, judicially challenged title to lands claimed by the United States, it seems to us plain that Congress could determine how and when such a suit must be prosecuted. At the least, the Quiet Title Act —a part of the Judicial Code—announces a new *procedural* scheme for this category of civil actions. Henceforth, an action seeking to quiet in the plaintiff title to federally claimed land must be instituted in the federal district court where the land is located (28 U.S.C. 1346(f), 1402(d));[19] the United States should be named as defendant (28 U.S.C. 2409a (a));[20] the Government may avoid judgment by

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[19] Or this Court, in the rare instance when the controversy also involves two adverse State claims and therefore falls within the Court's exclusive original jurisdiction. *California* v. *Arizona*, *supra*.

[20] The statute provides that "[t]he United States *may* be named as a party defendant" (28 U.S.C. 2409a(a); emphasis

entering a binding disclaimer (28 U.S.C. 2409a(d)); after an adverse determination, the United States must be permitted to exercise the option of acquiring the land upon payment of just compensation (28 U.S.C. 2409a(b)); and, finally, any such action must be filed within 12 years after the plaintiff knew or should have known of the Government's claim (28 U.S.C. 2409a(f)). We submit each of these procedural stipulations, including the limitations provision, became effective as of 1972 to any suit like North Dakota's regardless whether the Quiet Title Act was necessary as a waiver of sovereign immunity. See *Brown* v. *GSA*, 425 U.S. 820 (1976).

The question, of course, is ultimately one of legislative intent. See *Brown* v. *GSA*, *supra*, 425 U.S. at 825-835. Congress might have provided an alternative remedy against the United States directly, while leaving undisturbed any pre-existing right of action against the government official. Cf. *Carlson* v. *Green*, 446 U.S. 14 (1980). But that is hardly credible in the present context. First, the Quiet Title Act expressly exempts from its coverage certain categories of cases, but does not exclude any action formerly

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added). But the legislative history indicates that Congress intended the Quiet Title Act to be the exclusive means of challenging federal title to land (see page 33, *infra*), and there is no mention of any potential defendant other than the United States. Accordingly, we read "may" as granting consent to the action, not as offering the plaintiff a choice of federal defendants.

Here, North Dakota did not join the United States by name and we made no objection on that ground. To now require a remand and amendment of the Complaint for that purpose would be entirely wasteful. We therefore waive the point and treat the case as though the United States were formally the defendant.

maintainable against officials under 28 U.S.C. 1331. See 28 U.S.C. 2409a(a). Nor does the statute elsewhere "save" pre-existing remedies. Compare, e.g., 28 U.S.C. 1333(1). On the contrary, the Quiet Title Act, on its face, seems intended to embrace all suits "to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights." 28 U.S.C. 2409a (a). See also, 28 U.S.C. 1346(f).

Moreover, the legislative history of the Quiet Title Act—in sharp contrast to what this Court noted in relation to a recent amendment to the Tort Claims Act in *Carlson* v. *Green*, *supra*, 446 U.S. at 19-20—does not remotely suggest that Congress meant to create a "parallel, complementary cause of action," in addition to the remedy against the officer. The prevailing assumption, in truth, was that no pre-existing judicial remedy existed when title to Government land was claimed. See S. Rep. No. 92-575, 92d Cong., 1st Sess. 1-2, 3-4, 5 (1971); H.R. Rep. No. 92-1559, 92d Cong., 2d Sess. 6, 9 (1972). In these circumstances, Congress cannot have been expected to foreclose an alternative cause of action. But we legitimately may ask whether, it if had supposed existing law permitted a suit to try title against Government officials, Congress would have left that path open. See *Brown* v. *GSA*, *supra*, 425 U.S. at 828-829.

We can conceive no reason why that solution would have commended itself. Since only injunctive and declaratory relief was involved, "deterrence" of wrongdoing would not be served by allowing a suit against the agent, instead of the sovereign. Compare *Carlson* v. *Green*, *supra*, 446 US. at 21. Given the traditional stance of the United States to avoid having its title determined "behind its back" (see *Mine*

Safety Appliances Co. v. *Forrestal*, *supra*, 326 U.S. at 375, quoting *State of Louisiana* v. *Garfield*, *supra*, 211 U.S. at 78; *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 226-228 (1957)), the obvious course was to "regularize" the procedure for all title actions involving Government land by stipulating a single, straightforward suit against the sovereign itself.[21]

3. On the assumption that the Quiet Title Act preempts a previously available action against federal officers—sometimes of constitutional origin—it remains to show that the substitute is adequate. See *Davis* v. *Passman*, *supra*, 442 U.S. at 245. Certainly, there can be no complaint that the opportunity to obtain a binding judgment quieting the plaintiff's title as against the United States itself is less satisfactory than the supposed right to secure relief against the officer which, at least in theory, does not bind the sovereign. See *Leiter Minerals, Inc.* v. *United States*, *supra*, 352 U.S. at 226-227; *United States* v. *Lee*, 106 U.S. 196, 222 (1882). See, also, *Florida Department of State* v. *Treasure Salvors Inc.*, *supra*, slip op. 16, 28. The only arguable question is whether the limitations provisions of 28 U.S.C. 2409a(f) is, in some respect, unduly restrictive.

The point arises because the Quiet Title Act, when enacted, wholly foreclosed stale claims—perhaps including the present case.[22] It is indeed crystal clear

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[21] One can hardly suppose that the Department of Justice and the Department of the Interior, in recommending passage of the Quiet Title Act, would have understood that it provided a supplementary alternative to suits against officers. See S. Rep. No. 92-575, *supra*, at 2, 3-4, 5-6; H.R. Rep. No. 92-1559, *supra*, at 4, 7-10.

[22] As we have noted (notes 5 & 16, *supra*), North Dakota's cause of action may have accrued as early as 1955, in which

from the legislative history of the Act that, in 1972, Congress meant to bar any claim against Government lands that had "accrued" more than 12 years earlier. See H.R. Rep. No. 92-1559, *supra*, at 5, 7-8.[23] Thus, it might appear that, as applied to old claims, instead of "substituting" an equally effective remedy, the Quiet Title Act, through its limitations provision, "cut off" a preexisting cause of action—assuming such an action was not foreclosed by sovereign immunity before 1972. And this is impermissible, it can be argued, when the underlying right is of constitutional origin.

The answer, of course, is that any claim that could have been filed more than 12 years before the Quiet Title Act properly could be deemd to have lapsed by operation of laches or limitations without regard to the new statute. Significantly, the longest period of limitations known to federal law before the Quiet Title Act was six years. See 28 U.S.C. 1498(b), 2401, 2415(a), 2462, 2501. Although none of these provisions is directly applicable to an action against government officers under 28 U.S.C. 1331, the six-

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even it was foreclosed by the time bar of 28 U.S.C. 2409a(f) well before the Quiet Title Act became law in 1972. On the other hand, if the State only knew or should have known of the federal claim in 1962 or 1966, North Dakota had an opportunity to invoke the Act.

[23] An earlier version of the legislation contained an "escape hatch" or "grandfather" clause permitting old claims to be filed within two years of the effective date of the Act. See S. Rep. No. 92-575, *supra*, at 3. This was strongly objected to by the Department of Justice as inviting a flood of "stale claims" and the bill was amended to eliminate the "grandfather clause" but to reach back 12 years instead of only six. H.R. Rep. No. 92-1559, *supra*, at 5, 7-8.

year rule for suits against the United States is an obvious guideline in considering laches or in fashioning an appropriate limitations period.[24] Generously doubling that period and reaching back 12 years certainly cannot be labelled unreasonable, at least when the time is counted only from the date when the Government made its claim to the land manifest.

CONCLUSION

The judgments below should be vacated insofar as they determine the navigability of the Little Missouri River in the relevant stretch and reversed insofar as they hold 28 U.S.C. 2409a(f) inapplicable. The case should be remanded to the District Court for a determination under Section 2409a(f) whether the State of North Dakota knew or should have known of the federal claim to the lands in dispute more than 12 years before the present action was filed.

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[24] To be sure, federal courts usually borrow from State law the most appropriate limitations rule when federal law is silent on the point. E.g., *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 462 (1975). But this is not the inevitable result, especially when equitable relief is sought. *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946). When the cause of action derives from federal law and the remedy is against a federal officer, there is special reason for a uniform rule. Cf. *Carlson* v. *Green*, *supra*, 446 U.S. at 23-25 (survival of action). At least when the consequence of the action would be to dispossess the United States of its enjoyment of sovereign land, it would have been natural to apply by analogy the six-year limitations stipulated in federal law for suits against the United States—assuming such an action would lie before 1972. Thus, even before Congress acted, it is likely the courts would have disallowed as stale any such claim not filed for more than 12 years after notice of the federal interest.

Respectfully submitted.

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